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Nos. 335 and 336

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PORTLAND TERMINAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Solicitor General on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour

Division, United States Department of Labor, prays that writs of certiorari issue to review the judgments of the Circuit Courts of Appeals for the Sixth and First Circuits entered in the above cases on June 1, 1946, and April 29, 1946. The two cases present substantially the same question. Hereinafter we shall refer to the case in the Sixth Circuit as the "*Chattanooga* case" and cite the record in that case as "CR". The case arising in the First Circuit will be referred to as the "*Portland* case" and the record will be cited as "PR".

OPINIONS BELOW

The opinion of the district court in the *Chattanooga* case (CR. 365–371) is unreported. The majority and dissenting opinions of the Sixth Circuit Court of Appeals (CR. 378–382) are unreported. The opinion of the district court in the *Portland* case (PR 123–126) is reported at 61 F. Supp. 345. The majority and dissenting opinions of the First Circuit Court of Appeals (PR. 135–142) are reported at 155 F. 2d 215.

JURISDICTION

The judgment of the Circuit Court of Appeals in the *Chattanooga* case was entered June 1, 1946 (CR. 378). The judgment of the Circuit Court of Appeals in the *Portland* case was entered April 29, 1946 (PR. 142). The jurisdiction of this Court in both cases is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether persons being trained for jobs with respondents by performing the actual duties and functions of the jobs under the supervision of the regular employees are employees of the respondents within the meaning of the Fair Labor Standards Act during the period of training.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.
>
> SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—* * *.

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices * * * under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, * * *.

STATEMENT

Respondent in the *Chattanooga* case operates an interstate railway system furnishing the usual passenger and freight service and maintaining the customary shops, terminals, offices, and general railway facilities (CR. 3, 18). During the period covered by the complaint, it has required all persons seeking employment with it as switchmen, firemen, brakemen, clerks, stenographers, messengers, callers, and porters, to undergo a training period as a condition to going on the employment rolls (CR. 73). Before going through the training these workers must file formal applications for employment, furnish references, take a physical examination, and, in some occupations, must sign a release designed to protect respondent against claims for injuries (CR. 80, 149, 242). The train service employees (switchmen, firemen and brakemen) are then assigned to serve as "cubs" with the regular crews (CR. 81). Ordinarily the trainees do not displace

any member of the regular crew (CR. 367). It is respondent's policy not to hire a "cub" unless it recognizes that it is going to need him for a regular by the time his "cubbing" period is completed (CR. 59, 65, 66, 128).

Each new worker is required to cub under the supervision of a regular employee until he has worked on all of the various jobs which are performed by regular employees in his occupation. Thus a switchman must become acquainted with twenty-one separate jobs (three shifts and seven locations) (CR. 29–30); he is assigned to the first shift for four or five days, to the second shift for three or four days, and to the third shift for three or four days, working with the regular crew on each of the seven jobs on each shift (CR. 30, 31). A yard fireman is required to cub on at least four different jobs before being placed on the employment roll: firing the Diesel switch engine, firing the steam switch engine, hostler helper's job in the shop, and hostler helper's job on the outside (CR. 178). Over-the-road firemen must make fifteen or twenty runs, including "so many trips in local service, local freight, so many trips in fast freight, so many trips on passenger, and hostler a couple of days" (CR. 228, 95). Brakemen are also given a schedule of runs which includes all of the runs in each of the divisions (CR. 92, 242–245).

The cubs work the same hours (frequently from 12 to 16 hours a day—CR. 38, 66, 186, 246, 253) and perform the same functions as the regu-

lar employees (CR. 179, 186, 215–216, 252, 256). The cub switchmen throw switches, couple and uncouple cars, give signals, help classify trains, set hand brakes, and cut and connect air hose (CR. 32, 187, 215); cub firemen switch valves, keep a watchout for safety, shovel coal, make engines ready for the road, test them, fill the sand dome, coal bin and water tank, get the fire in proper condition, etc. (CR. 178, 179, 232); cub brakemen perform switching, signalling, coupling and uncoupling of cars (CR. 244, 252, 256). In addition, cub brakemen when traveling between stations, whether a run is on their schedule or not, are expected to assist in loading and unloading freight (CR. 94, 244, 248, 249). The cubs do not displace the members of the regular crews under whom they work; the latter are responsible for seeing that the work is properly done and, of course, are paid their customary wages.

The length of the cubbing period varies depending on the occupation and on respondent's need for regular workers (CR. 41, 213). Generally, the training period ranges from ten to thirteen days for switchmen (CR. 30, 31) to as long as six to seven weeks for the over-the-road firemen (CR. 227). As the general yardmaster stated, however, it takes only a few minutes for a cub switchman to learn to throw a switch or couple or uncouple a car (CR. 33, 34). A worker testified that a cub brakeman takes all of "fifteen to

twenty minutes" to "catch on to coupling and uncoupling trains, throwing switches" and performing the usual tasks of a brakeman (CR. 252). What the cubs are really supposed to learn is, in the case of the switchmen and the yard firemen, the lay-out of respondent's yard and the signals peculiar to respondent's operations (CR. 33–36, 53, 62, 180–181), and, in the case of the over-the-road firemen and brakemen, the road on which they must travel as regular employees (CR. 97, 236–237, 247–253). Indeed, new workers must go through a "training period" even if they have already had experience in the particular occupation (R. 205–206). For example, men with experience in firing and even already employed as regular firemen were nevertheless required to cub in order to learn respondent's road when respondent transferred them from one division to another (CR. 97–98).

Up to the time of suit, respondent required "cubbing" or "posting" under a regular employee even by clerks, stenographers, messengers, callers, and porters (CR. 109, 126, 131, 140). At the Chattanooga yard, new yard clerks and office clerks worked without pay eight hours or more a day, five to seven days a week, for periods ranging from three to eight weeks (CR. 19, 126, 139). Frequently, these clerks worked twelve or fourteen hours and in at least one instance twenty-four hours a day (CR. 139). Before he was paid, the clerk was expected to "work on each one of the

shifts" and on several different clerical jobs (CR. 106, 129–130, 158). The clerks followed the same routine as regular employees. They filled out train sheets, wrote up bills, itemized bills and did "billing and expensing and checking freight" (CR. 115, 107, 129, 131, 134). In addition, they checked way bills in the freight cars and made out way bills and expense bills (CR. 116). The clerks received their instructions from the supervisor, but after the first two days, the cub clerk did the checking himself (CR. 116). The cub "did the writing in the book" (CR. 131). The regular clerk simply helped him (CR. 116).

Stenographers, graduated from business college and with years of experience, were required to work five or six days without pay until they became familiar with respondent's special office routine (CR. 153).

"Callers," whose duties are to call train crew members before time for their departure, were required to work from one to three days without pay. The chief clerk explained, "We send around with him another caller to learn him the various cab tracks and how to find the various places in the yard that the cabooses might be located on, where their boarding places are, their telephone numbers, how to read these registers, how to keep the train numbers marked up with the crews in their proper order" (CR. 154–155).

Messengers were required to work for "about three days" without pay while they "learn the

various offices throughout the town" and to distribute mail "without getting it mixed up or misplaced" (CR. 155).

"As a rule," porters were paid "by the third day" (CR. 152). They worked for two days without pay. The chief clerk stated, "there is quite a bit of routine in connection with his work, sweeping up two floors, keeping the dust off the records, washing out the lavatories, taking out cuspidors and running a few little errands for the operators" and that it sometimes took him a week to teach them "how to use a broom" (CR. 151–152).

Prior to December 1943, cubs received no pay whatsoever for their work (CR. 48). On December 1, 1943, because of the manpower shortage created by the war, the company adopted the policy of paying cub switchmen, firemen and brakemen $5 a day "as an inducement or incentive" to obtain workers (CR. 75). Two weeks later, respondent issued instructions that cubs were to be paid only if they were subsequently put on the rolls as "regular" employees (CR. 312). Workers who did not become "regular" employees received no compensation whatsoever for their services. Respondent's witnesses testified that in January 1945, after this suit was instituted, respondent adopted the practice of paying all cubs $5 a day,[1] whether or not they were ulti-

[1] This was the maximum compensation paid, irrespective of the number of hours worked during the day. Thus, if em-

mately hired as "regular" employees (CR. 313). It is clear, however, that this practice was a temporary expedient growing out of the war emergency (CR. 74, 75, 78, 304). Respondent continues to deny that the trainees are employees and still asserts its right to withdraw the payments at any time (CR. 83, 84).

With respect to the clerks, messengers, callers and office porters, respondent's answer avers that "when the Fair Labor Standards Act became effective" it "recognized the possibility" that these workers "on rare occasions might perform a beneficial service for defendants at the same time that the regular employees were doing a similar but not identical assignment", and "proceeded to treat such applicants as if subject thereto" (CR. 18–19). It is admitted, nevertheless, that the practice of not paying these workers continued at least at the Chattanooga yard until suit was brought in November 1944, but it is contended that this was done "without knowledge of [the] Management" (CR. 19). In any event, respondent continues to contend that it does not "employ" these workers while they are training, that any money paid is not compensation for employment, and that it is under no duty to comply with the Act in the

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ployees worked more than 12½ hours, the rate of pay was less than the statutory minimum. The record shows that some employees worked as many as 16 hours without additional compensation (CR. 186–189).

future with respect to any of them (CR. 151, 175, 304).

Respondent in the *Portland* case operates a terminal facility at Portland, Maine, serving several interstate railroads (PR. 20–21). Among its employees are yard brakemen who undergo a training period substantially like that given by respondent in the *Chattanooga* case (PR. 26–27, 38–39).

Prior to October 1, 1943, these Portland Terminal workers were required to undergo the entire training period without compensation. Since that date, under an arrangement with the railroad union, if the worker completes the training period to the satisfaction of the company and is placed on the payroll, he is paid retroactively $4 per day for every day spent in training (Ex. 7, PR. 118). If he quits before completing the training, he is paid nothing for the work (PR. 16, 118). The company deducts Railroad Retirement tax from the money paid for the training period (PR. 98).

Both Circuit Courts of Appeals, with one judge dissenting in each instance, held that the trainees were not "employed" by respondents within the meaning of the Act. The First Circuit, while admitting that the trainees were "employees" within the literal language of the definition contained in the Act, placed its decision expressly on the theory that the trainees' work was not "pursued necessarily and primarily for the bene-

fit" of the company (PR. 140). The Sixth Circuit held that the company did not "suffer or permit" the trainees to work within the terms of the Act, but it is apparent from the opinion that the Court reached this conclusion primarily on the theory of lack of benefit to the company. Both courts relied heavily on *Walling* v. *Jacksonville Terminal Co.*, 148 F. (2d) 768 (C. C. A. 5), although in the *Jacksonville* case the trainees received no compensation whatsoever, and the Fifth Circuit indicated that a different result might have obtained had that factor been present. Judge Magruder, dissenting in the *Portland* case, and Judge Allen, dissenting in the *Chattanooga* case, urged that the trainees were permitted to work by respondents and therefore came squarely within the terms of Section 3 (g) of the Act which defines the word "employ" as including "to suffer or permit to work." While Judge Allen pointed out that as a practical matter it could not be said the work of the trainees was of no benefit to the companies, both judges thought that the question of benefit to the employer was irrelevant. Judge Magruder pointed out that the other provisions and the legislative history of the Act indicated a clear congressional intent to bring learners or trainees within the statute, and at the same time to provide administrative machinery to authorize lower wages in order to compensate for the fact that trainees "may be of little im-

mediate benefit—indeed, may be a 'disadvantage'—to the company" (PR. 141).

REASONS FOR GRANTING THE WRIT

The courts below have erroneously decided an important question of federal law which has not yet been, and which should be, settled by this Court. The decisions are out of harmony with the statutory definition of employment, the clear purpose of the learner provisions of the Act, and even the common law tests of the employment relation. Moreover, they open a widespread area of doubt as to the applicability of the Act to other industrial training programs. The importance of this question is indicated by a National Industrial Conference Board survey of 473 companies with a combined employment of 626,668, which revealed that four out of five companies had definite training programs. *Training for Industry*, National Industrial Conference Board (1937), pp. 1, 2, 20. In the words of Judge Magruder's dissent in the *Portland* case, the decisions below constitute "a serious impairment of the administrative safeguards contained in Section 14 of the Act" (PR. 142).

Section 3 (e) of the Act defines "employee" as "any individual employed by an employer" and Section 3 (g) in turn defines "employ" as including "to suffer or permit to work." Senator Black referred to this definition of employment as "the

broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657, quoted in *United States* v. *Rosenwasser*, 323 U. S. 360, at 363. Since the trainees perform the same duties as the regular employees and are clearly "permitted" by respondents to do so, the conclusion that they are employees within the literal language of the statute is inescapable.

Were there any doubt as to the inclusion of these trainees within the broad statutory definition of "employee," it would be dispelled by the express language of other portions of the Act and its legislative history. Section 14 provides that "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices * * * under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe * * *." This provision clearly assumes that learners in an industrial setting are "employees" and are subject to Section 6 unless the Administrator's regulations provide otherwise. The decisions of the courts below that workers are not employees under the Act while training or learning would render Section 14 a mere

nullity and deprive it of any meaning or possible application.

Section 14, as the legislative history reveals, was included in the Act because Congress was aware of and took into account the various considerations against requiring the payment of minimum wages to workers "who do not meet the usual qualifications of employment"[2] but must be trained before they can perform their jobs efficiently and with full benefit to the employer. It is evident that Congress weighed these considerations against the reasons for assuring such workers the minimum compensation provided by the Act, and evolved a compromise whereby it required the payment of the statutory wages to workers generally, including learners, but in recognition of the possible hardships to the employer and the resulting danger of curtailment of opportunities for employment, it decided to allow "a certain tolerance"[3] for the payment of subminimum wages to learners under prescribed conditions.

The legislative history shows that, from the beginning of the hearings and debates on the wage

[2] See Statement of Assistant Attorney General Jackson, Joint Hearings before the Senate Committee on Education and Labor and House Committee on Labor on S. 2475, 75th Cong., 1st sess., 1937, pp. 38, 50. See also remarks of Representative Griswold, *id.*, p. 44.

[3] See Statement of Assistant Attorney General Jackson, Joint Hearings, *supra*, p. 50.

and hour bills, Congress gave particular consideration to such special classes of workers as children, learners or trainees, apprentices, and handicapped persons. This solicitude manifested itself in the discussion and consideration of various exceptions and exemptions for learners, apprentices, and handicapped workers. The legislative discussions show plainly that it was intended to include learners and apprentices within the term "employees." The only questions raised with respect to them were whether there should be some tolerance permitting payment of subminimum wages and who should determine the conditions of the tolerance. Among the suggested exemptions was a proposal by Representative Taylor of Tennessee to provide a "grace" period of six months' "training" for beginners before the minimum wage provisions of the Act should become applicable. 83 Cong. Rec. 7134. It is significant that this proposal was rejected in favor of the system of administrative regulation of learners provided by Section 14 of the present Act. Congress in that Section clearly provided that conditions under which learners could work below the minimum wage were to be regulated by the Administrator of the Wage and Hour Division charged with the responsibility of enforcing the Act in the public interest. Congress deliberately decided not to leave these conditions to the "discretion" of employers who would normally be influenced solely by private interests.

The decision reached by Congress—to place the regulation of the employment of all beginners in the hands of the Administrator—was apparently due to the Congressional desire (1) to assure all workers, including learners, the minimum wage whenever possible and (2) to prevent evasion of the minimum wage provisions of the Act under the guise of employing "learners."[4] The statutory provision employed to carry out these objectives, in its use of the phrase "employment of learners," left no room for doubt that learners are embraced within the term "employee."

In the face of the express provisions and the legislative history of the Act, it is difficult to see how the Act's coverage can be made to depend on the existence of a "primary or necessary benefit" to the employer as against the employee. As indicated by the legislative history, Congress was well aware of the fact that most learners or trainees are of little or no benefit to the employer during their training period and frequently represent a liability. As pointed out by Judge Magruder, "inexperienced operators of looms in a textile mill may spoil goods, get the machines out of order, have a low production rate, may be in fact an economic liability to the employer, until skill and facility are acquired" (PR. 141–142). Moreover, as a practical matter it cannot be said that the training is of no benefit to the employer who

[4] See 83 Cong. Rec. 7309; Joint Hearings, *supra*, pp. 37, 38, and 44.

thereby acquires a pool of men familiar with the company's system and facilities and available for work as regular employees. It is difficult to understand the payment of four or five dollars a day to the trainees during the war in the absence of any benefit to respondents. "A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or an extravagance." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 130. It is significant that, although many employees derive some training and new skills from their employment, the benefit derived by the trainees in the instant cases appears to be quite limited. The type of knowledge acquired during respondents' training period is of primary benefit to the trainee only so long as he works for the company. Little time is devoted to learning the actual manual operations compared with the greater part of the training period devoted to learning the details of the particular company's system and facilities.

The courts below were impressed by the fact that the employer did not derive immediate benefits from the trainees because a full crew was usually on hand even though the trainees performed the actual manual work. But this Court has often recognized that workers are employed within the meaning of the Act when they perform merely preparatory activities, from which the employer derives no immediate benefit. *Tennessee*

Coal, Iron and R. R. Co. v. *Muscoda Local*, 321 U. S. 590, 598–9; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161; *Anderson* v. *Mt. Clemens Pottery Co.*, No. 342, October Term, 1945, decided June 10, 1946.

The courts below sought to minimize the effect of Section 14 on the theory that by its terms it applies only to those learners who are *employed* and that the trainees in the instant cases were not employed by respondents. This view apparently springs from the courts' belief that the question of employment is controlled by the existence of certain formal indicia of the employment relationship—that "it is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law."[8] But even apart from the plain statutory definition and the unmistakable Congressional intent as evidenced in Section 14 and in its legislative history, these trainees should be considered employees under well-established principles of law. It is significant that railroad trainees such as are involved in the instant cases have been held consistently to be "employees" both for the purpose of enabling them to recover under the employers'

[8] *Portland* majority opinion (PR. 139) and *Jacksonville* decision, both quoting from *Bowman* v. *Pace Co.*, 119 F. 2d 858 (C. C. A. 5). The *Chattanooga* majority opinion inferentially adopted this view by its reliance on the *Jacksonville* case.

liability statutes[6] and for the purpose of denying them recovery under the common law "fellow servant doctrine."[7] It follows, *a fortiori*, that they are employees within "the broadest definition that has ever been included in any one act." *United States* v. *Rosenwasser*, 323 U. S. 360, 363, n. 3.

Furthermore the narrow interpretation adopted by the courts below overlooks the congressional purpose in enacting this type of remedial legislation, and is inconsistent with decisions emphasizing the broad definition to be given "employee" under statutes such as this. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Walling* v. *Rutherford Food Corp.*, decided July 18, 1946, No. 3213 (C. C. A. 10).[8] It

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[6] *Brown* v. *Chicago, R. I. & P. Ry. Co.*, 315 Mo. 409, 286 S. W. 45; *Rief* v. *Great Northern Ry. Co.*, 126 Minn. 430, 148 N. W. 309; *Chesapeake & Ohio Ry. Co.* v. *Harmon's Admr.*, 173 Ky. 1, 189 S. W. 1135; *Findley* v. *Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198; *Atchison, Topeka & Sante Fe Ry. Co.* v. *Fronk*, 74 Kan. 519, 87 Pac. 698.

[7] *Huntzicker* v. *Ill. Central R. Co.*, 129 Fed. 548 (C. C. A. 6); *Millsaps* v. *Louisville, New Orleans & Texas Ry. Co.*, 69 Miss. 423, 13 So. 696; *Smith* v. *Western & Atlantic R. R. Co.*, 134 Ga. 216, 67 S. E. 818; *Weisser* v. *Southern Pacific R. R. Co.*, 148 Calif. 426, 83 Pac. 439; *Hewett* v. *Woman's Hospital Aid Assn.*, 73 N. H. 556, 64 Atl. 190.

[8] The definitions of employer in the National Labor Relations Act, which was before this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, and in

is by now well settled that the economic relationships between businesses and workers "cannot be fitted neatly into the containers designated 'employee' and 'employer' which an earlier law had shaped for different purposes." These terms "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" and not by any "technical legal classification for purposes unrelated to the statute's objectives * * *. Where all the conditions of the relation require protection, protection ought to be given." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, at 128–129.

The Sixth Circuit was also apprehensive that "if trainees are to be considered as 'employees' then the long entertained concept of voluntary apprenticeship passes entirely away." (CR. 381.) Suffice it to say that Congress has expressly included apprentices within the provisions of the Fair Labor Standards Act, though permitting the Administrator to work out the conditions under which such apprentices could work below the minimum wage. Section 14.

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this Act are identical. Since this Act in addition includes a broad definition of "employ" not included in the National Labor Relations Act, Congressional intent to expand the concept of "employment" is even clearer in the case of this statute.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
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